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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

EDNA VALLEY WATCH et al., Plaintiffs and Appellants, v. COUNTY OF SAN LUIS OBSIPO et al, Defendants and Respondents.	2d Civil No. B223653 (Super. Ct. No. CV080636) (San Luis Obispo County)

This is an appeal from an order partially denying appellants' motion for attorney fees under Code of Civil Procedure section 1021.5, the private attorney general statute.[1]

The trial court denied appellants an award of fees incurred in administrative proceedings. The trial court also denied one of the appellants fees incurred in a petition for writ of mandate because of his personal stake in the litigation.

Because appellants did not cite relevant authority in their opening brief, they waived their appeal of the denial of fees incurred in administrative proceedings. We reverse and remand the denial of fees incurred in the petition for writ of mandate for

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

further consideration in light of *Conservatorship of Whitley* (2010) 50 Cal.4th 1206 (*Whitley*).

FACTS

The Unitarian Universalist Fellowship of San Luis Obispo County ("Church") planned to build an 11,000-square-foot church complex in the Edna Valley area of San Luis Obispo County ("County"). Philip G. da Silva ("Da Silva") owns property adjacent to the planned church facility. Edna Valley Watch ("Edna") is a nonprofit association.

The County Planning Commission granted the Church a conditional use permit for its project. Da Silva appealed the decision to the County Board of Supervisors ("Board"). The Board denied the appeal.

On July 11, 2008, Da Silva and Edna filed a petition for writ of mandate to direct the County to rescind its approval of the project. The petition was based on the alleged failure of the County to comply with the California Environmental Quality Act. ("CEQA", Pub. Res. Code, § 21000 et seq.)

Six days after the petition was filed, the Church's counsel wrote to Da Silva's and Edna's counsel. The letter stated that the Church was abandoning the approval it received from the County, and would return to the permitting process. The letter requested Da Silva and Edna take no further action on the writ petition.

Apparently concerned that the approval was still valid, Da Silva and Edna refused to dismiss. On August 20, 2008, the Church's counsel wrote to assure De Silva and Edna that the Church would not reenter the approval process, but that the project was dead. Da Silva and Edna still refused to dismiss. A number of case management conferences were held. By the time of the case management conference on November 13, 2008, the Board had adopted a resolution rescinding the project's approval. Da Silva and Edna refused to dismiss until January 26, 2009.

On April 21, 2009, Da Silva and Edna filed a motion for attorney fees pursuant to section section 1021.5. The parties requested $35,044.50: $19,329.50 for the administrative appeal to the Board; $8,041 for "litigation"; and $7,674.50 for the fee

motion. Thirteen percent or $4,620.40 was claimed by Da Silva and 87 percent or $30,424.40 was claimed by Edna.

The trial court found that the writ petition was the "catalyst" for the ultimate withdrawal of the project application. The court concluded that as a matter of law the parties are not entitled to an award of fees incurred in administrative proceedings. (Citing *Best v. California Apprentice Council* (1987) 193 Cal.App.3d 1448, 1457-1458.)

The court also concluded that "[D]a Silva's personal stake in blocking the project was not so disproportionate to the cost of this litigation that an award of fees to him is necessary or appropriate." In so concluding, the court found: The proposed 35-foot-high, 11,000-square-foot, multiuse facility was located immediately adjacent to Da Silva's residence. The residence was a 1903 Victorian purchased in 1997 ("Victorian"). From the date of purchase until the proposed project was terminated, the Da Silvas spent over $350,000 in upgrading their Victorian, in addition to their personal time and labor. The Victorian has a market value of more than $1 million.

The court cited letters from Da Silva to county supervisors stating that the proposed project would be devastating to his family's peace, safety and security, not to mention his plans to turn the Victorian into a bed and breakfast inn. The letters cited noise, light pollution, loss of privacy, and loss of the view he "paid for."

The court determined Edna is entitled to an award of fees incurred in litigation. The court stated, however, the claim for fees must be reduced. The court found there was unnecessary litigation on a case that should have been quickly resolved. The court awarded Edna $2,625 for the litigation and $895 for the fee motion.

DISCUSSION

I

Section 1021.5 provides in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of

private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

The ordinary standard of review for a motion for attorney fees is abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) De novo review of the trial court's order is warranted, however, where the determination is based on statutory construction. (*Ibid.*)

II

Da Silva and Edna contend the trial court erred in concluding that fees incurred in administrative proceedings cannot be awarded.

Da Silva and Edna argue that the exhaustion of administrative remedies is a jurisdictional prerequisite to a lawsuit challenging a CEQA determination. (Citing Pub. Res. Code, § 21177.) They conclude administrative hearings are included in the term "action" as used in section 1021.5. Their opening brief cites no authority in support of this conclusion. They make no attempt to discuss the case authority until their reply brief. That is too late. It deprives the County of the opportunity to respond to Da Silva's and Edna's argument. We treat the contention as waived. (*Badie v. Bank of America* (1999) 67 Cal.App.4th 799, 784-785.)

III

Da Silva contends the trial court erred in denying him fees.

In denying Da Silva a fee award, the court relied on his "personal stake" in blocking the project. The court cited *Williams v. San Francisco Board of Permit Appeals* (1999) 74 Cal.App.4th 961, page 965. *Williams* decided that the court could deny a prevailing plaintiff a fee award under section 1021.5 because of his nonpecuniary interest in the litigation.

While this case was pending on appeal, however, our Supreme Court decided *Whitley*. *Whitley* disapproved the line of cases on which the trial court relied. It holds that a litigant's personal nonpecuniary interests may not be used to disqualify the litigant from obtaining fees under section 1021.5. (*Whitley, supra*, 50 Cal.4th at p. 1211.)

Instead, the court must focus on the financial burdens and incentives involved in bringing the lawsuit. (*Ibid.*)

Whitley cites *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, pages 9 through 10, for the proper method of balancing costs and benefits: "'The trial court must first fix -or at least estimate- the monetary value of the benefits obtained by the successful litigants themselves. . . . Once the court is able to put some kind of number on the gains actually attained it must discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome. . . . Thus, if success would yield . . . the litigant group . . . an aggregate of $10,000 but there is only a one-third chance of ultimate victory they won't proceed -as a rational matter- unless their litigation costs are substantially less than $3,000. [¶] 'After approximating the estimated value of the case at the time the vital litigation decisions were being made, the court must then turn to the costs of the litigation -the legal fees, deposition costs, expert witness fees, etc., which may have been required to bring the case to fruition. . . . [¶] The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case. . . . [A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.' [Citation.]" (*Whitley, supra,* 50 Cal.4th at pp. 1215-1216.)

Da Silva points out that his petition did not seek monetary damages and did not seek to permanently terminate the project. He argues that the test of a person's interest must be based on the verified petition and the relief it seeks. He claims that because his petition sought only compliance with CEQA, the pecuniary benefit he might realize is too speculative to deny him an award of fees.

Da Silva cites no authority in support of his argument. Nothing in section 1021.5 requires the court to confine its analysis to the relief sought on the face of the pleadings and to feign naiveté as to plaintiff's true purpose in bringing an action.

Abandonment of a project is hardly a unique result in a CEQA action. There is very little doubt the permanent termination of the project was the result Da Silva hoped for in this case. Nor is there doubt Da Silva obtained a pecuniary benefit from the termination of the project.

Here Da Silva had financial as well as nonpecuniary interests in stopping the project. It appears the trial court relied on both in denying him fees under section 1021.5. The trial court shall reconsider Da Silva's attorney fees without regard to his nonpecuniary interests in light of *Whitley*.

The order denying Da Silva an award of fees incurred for the petition for writ of mandate is reversed and remanded. In all other respects, the trial court's order is affirmed. Each party shall bear its own costs.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Charles S. Crandall, Judge

Barry T. LaBarbera, Judge

Superior Court County of San Luis Obispo

Law Offices of Michael R. Jencks, Michael R. Jencks for Plaintiffs and Appellants.

Warren R. Jensen, County Counsel and timothy McNulty, Chief Deputy County Counsel for Defendants and Respondents.